

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

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In the Matter of)

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Ludlow, California))

MM Docket No. 92-
RM-8022

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Chief, Allocations Branch

REQUEST FOR ASSOCIATION WITH RECORD

KHWY, Inc. ("KHWY"), the licensee of Station KHYZ(FM), Channel 258B, Mountain Pass, California, 1/ hereby requests that this submission be associated with the record in the above-captioned proceeding to reflect the correct status of KHYZ. As explained more fully below, KHYZ is not a "grandfathered" superpower station, as stated in footnote 5 of the *Report and Order*, DA 95-12 (released January 12, 1995), in the above-captioned proceeding (the "*Report and Order*"). Instead, the Commission intentionally granted a waiver in 1985 for KHYZ to exceed the normal contour limit for Class B stations, due to the unique service needs of the Mojave Desert area, particularly Interstate 15, served by KHYZ. KHWY is not petitioning for reconsideration of the allotment of Channel 261B1 to

1/ The name of the licensee of KHYZ was changed on July 1, 1992 (and the Commission was informed at that time of such change) from KRXV, Inc. to KHWY, Inc. KHWY has recently requested again that the Commission's records be updated to reflect this name change.

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Ludlow, California, because, assuming the availability of an appropriate site, a station may serve that community while still protecting KHYZ's authorized contour. This submission corrects the *dicta* in that *Report and Order* that misstates KHYZ's status.

I. THE REPORT AND ORDER INACCURATELY TERMED KHYZ A GRANDFATHERED STATION

In its comments on the *Notice of Proposed Rule Making* in this proceeding, 7 FCC Rcd 4460 (Allocations Branch 1992), KHWY noted several concerns with the Channel 261B1 proposal, including predicted interference from and to grandfathered superpower station KOLA(FM), San Bernardino, California. While KHWY noted that certain sites might have the potential of causing interference to KHYZ, it did not object to the allotment of Channel 261B1 on that ground. 2/

In the *Report and Order*, the Allocations Branch stated that it would consider in the allocations scheme grandfathered superpower stations such as KOLA only to the extent of the maximum contour specified for their class. The *Report and Order* also characterized KHYZ as such a grandfathered superpower station. As discussed next, this characterization is inaccurate.

2/ KHWY's Engineering Statement indicated that the area for placement of the Channel 261B1 facility was limited by KHYZ's contour, and that depending on the site of the facility, interference might or might not result.

II. THE COMMISSION INTENTIONALLY GRANTED KHYZ A WAIVER OF THE CONTOUR LIMITS FOR ITS CLASS

Unlike stations such as KOLA which had been authorized with greater service contours *before* the adoption of the current, more restrictive class limits, the Commission expressly granted a waiver in 1985 to KHYZ for a protected contour in excess of the Class B limits so that KHYZ could meet the special needs of its Mojave Desert area allocation.

KHYZ (formerly KXVR) is a unique station. It, and its sister station, KRXV(FM), Yermo, California, were conceived to provide service to the unserved travelers through the Mojave Desert. *See Yermo and Mountain Pass, CA*, 45 RR2d 58, 59 [¶ 5] (Broadcast Bureau 1979). From the outset, the key purpose of the stations was to provide programming -- particularly weather and highway safety notices -- to a 150-mile stretch of Interstate Highway 15 (between Barstow, California and Las Vegas, Nevada). *Id.* The Bureau recognized this unique unserved need, and consequently assigned Class B allotments (reserved for wide-area coverage) so that the widest area of Interstate 15 would be served. *Id.* at 60 [¶ 9]. The Bureau was so concerned that the travelers be served that it conditioned the assignments on the use of maximum facilities. *Id.* at 61 [¶ 10]. Moreover, the allotment order addressed the fact that, even with maximum facilities on both channels, a 15-mile segment of Interstate 15 would not be provided 60 dBu service. The Bureau found comfort, however, in the fact that "in the absence of interference from other stations, as is the case here" a minimum of service from the Mountain Pass and Yermo stations would reach that segment. *Id.* at 60 n.7.

Thereafter, KHWY applied for, and received a waiver of the Commission's rules to increase the effective radiated power of KHYZ from 2.29 kilowatts to 10 kilowatts, in excess of the normal Class B maximum. See FCC File No. BPH-820714AB (granted May 22, 1985). The public interest justifications for the waiver included the showing that with the expanded service area, KHYZ would provide to several segments of the highway either the only aural service, or the only aural service serving the travelers on Interstate 15. Moreover, the waiver was justified because the Bureau's hope in the allotment order that a minimum of service would reach the central segment of the highway proved too optimistic, due to terrain shielding. Following the Commission's grant of the waiver, KHYZ began expanded service. Although in the intervening years the Commission has authorized several stations in the Mojave Desert, none -- other than KHYZ/KRXV -- provide the essential continuum of service to the Interstate 15 travelers through this harsh environment.

The Commission's affirmative authorization extending KHYZ's protected service area is thus completely inapposite to those situations where stations happened to be operating at higher power when the current class restrictions were adopted. KHYZ is a superpower station, but it is not grandfathered.

This distinction between grandfathered stations as opposed to stations operating pursuant to waivers has been stressed by the Commission before. For example, in *Las Piedras, Puerto Rico*, 87 FCC 2d 1011 (1981), the Commission

affirmed the decision not to change the allotment of Station WZAR(FM), Ponce, Puerto Rico, when the new allotment would meet the minimum distance separation rule, but would in fact impinge on the service areas of WZAR and WIAC-FM, San Juan, Puerto Rico. *Id.* at 1014. WZAR and WIAC were already short-spaced to each other, pursuant not to grandfathering, but due to short-spacing waivers that were justified by public interest benefits. *Id.* at 1013-14. The Commission held that the generally applicable minimum separation rule “was rendered inapplicable” by the Commission’s decisions to grant waivers of that rule. *Id.* at 1014. Applying only the theoretical protections of the minimum spacing rule when the Commission had granted intentional waivers, according to the Commission, “produces an incongruous result” which would be at odds with its decision to waive the rules for public interest reasons. *Id.* Consequently, the Commission refused to abide by the general protection standards when it would undermine intentionally granted waivers.

III. WHILE THE ISSUE IS NOT BEFORE THE ALLOCATIONS BUREAU AT THIS TIME, THE RECORD IN THIS PROCEEDING SHOULD REFLECT KHYZ’S ACCURATE STATUS

As noted above, KHWY did not object to the allotment of Channel 261B1 to Ludlow on the grounds that KHYZ’s protected contour would necessarily be interfered with or cause interference to the new allotment. Assuming an appropriate site can be secured, a station serving Ludlow can be constructed on Channel 261B1 while providing protection to KHYZ’s *authorized* superpower contour. KHWY plans to review all applications tendered during the filing window



for Channel 261B1 at Ludlow to confirm that the protected contour intentionally authorized by the Commission to KHYZ continues to be fully protected.

Thus, while the Allocations Branch need not reconsider, and KHYZ is not requesting such reconsideration of, its ultimate decision to allot Channel 261B1 to Ludlow, the record should reflect that the *dicta* in the *Report and Order* that KHYZ is a grandfathered station is not accurate. Nor is KHWY requesting at this juncture that the Allocations Branch express an opinion on the issue of the degree of protection afforded KHYZ's authorized contour. At this time, KHWY simply is correcting for the record KHYZ's status. As detailed above, KHYZ is a superpower

station, not by grandfathering, but by way of intentional waiver by the Commission. 3/ This submission, which documents KHYZ's correct status, should be associated with the above-captioned docket.

Respectfully submitted,

KHWY, Inc.

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February 13, 1995

3/ KHWY notes that J.D. ("Steve") Stephenson, the principal of the petitioner, Miracle Broadcasting, recently surrendered construction permits for FM stations in the Mojave Desert after KHWY filed evidence with the Commission that Stephenson was fronting for Thomas P. Gammon in order to evade the multiple ownership restrictions. Whether the petitioner remains interested in or qualified for the Channel 261B1 allotment at Ludlow is an issue that can be resolved at the application stage.

CERTIFICATE OF SERVICE

I, hereby certify, that on this 13th day of February, 1995, I caused to be placed in the United States mail, first class, postage prepaid, a copy of the foregoing "Request for Association with Record" addressed to the following:

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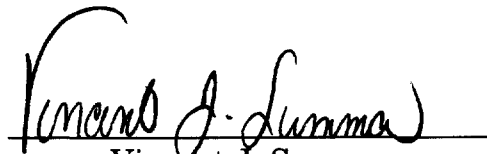
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